

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GIULIO C. MONACO	:	MODIFIED ORDER
	:	DTA NO. 818759
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Period October 1, 1989 through November 30, 1989,	:	
and for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period June 1, 1993 through May 31, 1996.	:	

Petitioner, Giulio C. Monaco, 8 DeForest Court, P.O. Box 163, West Nyack, New York 10994, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period October 1, 1989 through November 30, 1989, and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1993 through May 31, 1996.

The Division of Taxation ("Division") appearing by Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel) brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the grounds that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition for a hearing with the Division of Tax Appeals within 90 days of the issuance of the notices of determination, and for petitioner's failure to file a petition for a hearing within 90 days of the issuance of the conciliation order dismissing request. The Division submitted a Notice of Motion and the affidavit of Jennifer A. Murphy, Esq., with attachments, including the affidavit of Geraldine

Mahon, two affidavits of James Baisley and the affidavit of Carl DeCesare, in support of its motion. Petitioner responded to the Division's motion by filing the reply affirmation of James H. Tully, Jr., Esq., on April 1, 2002. The subject matter of the Division's motion for summary determination was notice of determination number L012731720, notice of determination number L012598850 and notice of deficiency number L006333447.

On June 3, 2002 Gary R. Palmer, Administrative Law Judge, issued an order which dismissed the petition as to notice number L012731720, granted the petition and canceled notice number L012598850, and granted the petition as to notice number L006333447, which matter was to be scheduled for a hearing on the merits. The cancellation of notice number L012598850 was grounded on two separate bases, the first being that the Division failed to present any evidence in support of the date and fact of the mailing of the notice, thereby failing to prove that a valid notice was ever issued. The second basis for the cancellation was the failure of the Division to include a copy of notice number L012598850 in the record.

The Division's attorney, Jennifer A. Murphy, Esq., by letter dated June 6, 2002, requested that the order of June 3, 2002 be amended as to notices of determination numbered L012731720 and L012598850. Ms. Murphy explained that with regard to notice number L012598850, the Division never sought to prove that petitioner's request for a conciliation conference was filed late, only that the petition filed in protest of the conciliation order dismissing request was filed more than 90 days after the issuance of that conciliation order. Then, according to the Division, it is of no consequence that the Division failed to file copies of the notice, mailing records and affidavits of habit relating to the mailing of notice number L012598850 because the relevant jurisdictional document is the conciliation order dismissing request, regarding which it had

provided mailing records as part of its motion. The Division asserts that the same facts apply with equal force to notice of determination number L012731720 because the conciliation order denied the request for a conference for both notices. In her letter, Ms. Murphy asked that an amended order be issued granting the Division's motion relating to the late filing of the petition filed in protest of the conciliation order dismissing request for both notices, notwithstanding that the Division had already prevailed on its motion for summary determination as to notice number L012731720 for the late filing of petitioner's request for a conciliation conference. Ms. Murphy's final contention in the letter of June 6, 2002 is that if the Division were to lose on the issue of timeliness, the proper remedy is to afford the Division a hearing rather than cancel the notice.

By letter dated June 10, 2002, the Assistant Chief Administrative Law Judge informed the attorneys for both parties that the Division's letter of June 6, 2002 is to be deemed a motion to reargue in accordance with CPLR 2221.

In response to the motion to reargue, petitioner's attorney, James H. Tully, Jr., Esq., filed his affidavit sworn to on June 24, 2002, along with a memorandum of law. On behalf of petitioner, Mr. Tully avers that the Administrative Law Judge properly canceled notice of determination number L012598850 due to the Division's failure to prove the date and fact of mailing of that notice and, further, that the Division's proof of mailing of the conciliation order dismissing request is deficient.

Upon review of the pleadings and the letter of Jennifer A. Murphy, Esq., dated June 6, 2002, in support of the Division's motion to reargue, and the affidavit of James H. Tully, Jr.,

Esq., and petitioner's memorandum of law in opposition thereto, Gary R. Palmer, Administrative Law Judge, renders the following modified order.

ISSUE

Whether the Division has set forth sufficient grounds in support of its motion for leave to reargue the prior order of the Administrative Law Judge made and dated June 3, 2002.

FINDINGS OF FACT

The following findings of fact are restated *in toto* from the order of the Administrative Law Judge dated June 3, 2002.

1. The subject matter of this proceeding consists of three statutory notices identified in the petition by notice numbers L012598850, L012731720 and L006333447. The record includes a copy of notice number L012731720. There are no copies of the notices numbered L012598850 or L006333447 in the record. Notice number L012731720 is addressed to petitioner at 162-35 85th St., Howard Beach, NY 11414-3324. This notice imposed tax in the sum of \$28,407.06 plus interest of \$1,966.08 and penalty in the sum of \$7,385.82, for a total of \$37,758.96.

2. The attorney for the Division has, in her affidavit in support of the Division's motion for summary determination, conceded that petitioner is entitled to a hearing on the merits as to notice number L006333447.

3. Petitioner's attorney filed the petition with the Division of Tax Appeals on September 28, 2001. The petition listed all three notice numbers and stated, *inter alia*, that "[p]etitioner has no record or memory of receiving any assessment on said taxes" Attached to the petition is a consolidated statement of tax liabilities dated July 10, 2000, listing the three notice numbers set forth in Finding of Fact "1" and the amounts claimed to be due thereon by tax amount, interest,

penalty and the then current balance due on each notice and the total balance claimed to be due on all three notices. The petition has a box checked indicating that a conciliation conference was not requested.

4. On December 6, 2001, the Division filed its answer to the petition averring that petitioner was liable for sales tax due on notices numbered L012731720 dated October 7, 1996, and L012598850 dated September 5, 1996, as an officer or responsible person of G.C. Monaco Electric & Daughter, Inc. According to the answer petitioner's liability for notice number L006333447 dated March 1, 1993 was premised on his being liable as an officer or responsible person of the same corporation for unpaid withholding tax for the period October 1, 1989 through November 30, 1989.

5. The conciliation order dismissing request submitted by the Division with its motion papers is dated February 28, 1997, and sets forth on its face notice numbers L012598850 and L012731720. This conciliation order reads as follows:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on September 5, 1996, but the request was not mailed until January 29, 1997, or in excess of 90 days, the request is late filed. The request filed for a Conciliation Conference is denied.

Also included in the Division's motion papers is a copy of a request for a conciliation conference bearing notice number L012598850, which request has a printed date near the top reading "09/05/96," and a hand-written date beneath petitioner's signature reading "10/10/96." Included with the copy of the request for a conciliation conference is a copy of an envelope addressed to "Bureau of Conciliation, Bldg. 9, WA Harriman Campus, Albany, NY 12227-0300." The envelope bears a U.S. Postal Service ("USPS") postmark dated January 29, 1997 and has no return address. Both the envelope and the request for a conciliation conference bear a date stamp

dated January 31, 1997, which stamp includes the language “Rec’d. Bw. of Conciliation & Mediation.”

6. The Division submitted the affidavit of Geraldine Mahon, an employee of the Division familiar with the processing of notices of determination by the Division’s CARTS Control Unit. Ms. Mahon, in her affidavit, describes the routine office procedures used by the Division to prepare such notices for mailing. The Division also submitted the affidavit of James Baisley, sworn to January 24, 2002. Mr. Baisley is the Chief Mail Processing Clerk of the Division’s Mail Processing Center since 1994, who is fully familiar with the operations and procedures of the Mail Processing Center, and whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. These two affidavits describe the general procedures for the preparation and mailing of statutory notices, including notice number L012731720 to petitioner at 162-35 85 St., Howard Beach, NY 11414-3324 on October 7, 1996. The general process for issuing and mailing statutory notices in 1996 began with the computer generation of the notices and a listing of the taxpayers to whom such notices were to be sent by certified mail on a particular day, hereinafter referred to as the Certified Mail Record (“CMR”). A certified control number was assigned to each notice listed on the CMR. In this case, certified control number P 911 006 076 was associated with notice number L012731720 mailed to petitioner, which certified control number appears on page 27 of the CMR as well as on the face of notice number L012731720.

The statutory notices were picked up by an employee of the Division’s Mail Processing Center and delivered to a branch of the USPS in the Albany, New York area. The CMR for the notices mailed on October 7, 1996 consists of 43 pages, and the notice of determination mailed

to petitioner at 162-35 85th Street, Howard Beach, New York is listed on page 27. The certified mailing to petitioner was one of 470 pieces of certified mail delivered to the USPS on October 7, 1996 by the Division's Mail Processing Center employee. Identifying information relating to other taxpayers in the remaining 469 certified mailings listed on the CMR was redacted to preserve the confidentiality of those other taxpayers.

7. A postal employee affixed a USPS postmark identifying the Colonie Center branch of the USPS to each page of the CMR. The date on the postmark was October 7, 1996. The USPS employee circled the printed number 470 on page 43 of the CMR, and then wrote and circled the number 470 below the printed 470 and above his or her signature. A Mail Processing Center employee specifically requested that USPS employees either circle the total number of pieces of mail received or indicate the total number of pieces received at the post office by writing that number on the last page of the CMR. In this case, the USPS employee circled both the number 470 that he wrote on the page, as well as the printed 470, to acknowledge the receipt of 470 pieces of mail. A USPS employee returned the CMR to a Mail Processing Center employee who, in turn, delivered the CMR to the CARTS Control Unit to be maintained as a permanent record in the regular course of its business.

8. No comparable certified mailing records were produced by the Division relating to the issuance of the notices numbered L012598850 or L006333447.

9. The Division included in the documents presented in support of its motion, a copy of petitioner's 1995 form IT-201, Resident Income Tax Return showing as petitioner's address 162-35 85th Street, Howard Beach, NY 11414. Petitioner's signature on this return was dated April 14, 1996.

10. The Division's motion papers include documents that relate to the mailing of the conciliation order dismissing request described in Finding of Fact "5". These documents include a separate affidavit of James Baisley sworn to on January 23, 2002, the affidavit of Carl DeCesare, the Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services ("BCMS") and a five-page CMR. Mr. DeCesare is familiar with the operations and procedures of BCMS. All conciliation orders mailed within the United States are sent by certified mail. The Word Processing Unit of BCMS is responsible for the preparation of conciliation orders dismissing requests and the associated CMRs. As with the CMRs listing statutory notices, these CMRs list taxpayers to whom conciliation orders were sent by certified mail on a particular day. The conciliation order CMRs are processed by a clerk who manually enters the certified control numbers on the CMR next to the printed taxpayer's name and address. Each page of the CMR is a separate and individual CMR for the conciliation orders dismissing request listed on that page. Each page of the conciliation order CMR has a space for the USPS employee to record the total number of pieces of mail listed by the sender on that page and a separate space for the total number of pieces of mail received at the post office. There is also a space on each page of the CMR for the receiving postal employee to enter his or her signature or initials. The conciliation order dismissing request CMR attached to Mr. DeCesare's affidavit consists of five pages. Petitioner's name and address appear on page four of the five pages next to certified control number P 482 629 057. Mr. Baisley's affidavit describes his role as the Chief Mail Processing Clerk of the Mail Processing Center where his duties include supervising the staff that delivers outgoing mail to USPS branch offices as well as the staff who weigh and seal each envelope containing a conciliation order and who affix the postage and fee

amounts to each envelope and then count and verify the names, addresses and certified mail control numbers on the envelopes against the information on the CMR. Next, a member of Mr. Baisley's staff delivers the sealed and stamped envelopes to the post office where a USPS employee affixes a dated postmark to each page of the CMR and writes in the total number of pieces of mail received at the post office that are listed on each page of the CMR. On page 4 of the CMR there is a postmark dated February 28, 1997, below which the number 14 has been entered in the space next to the words "Total Number of Pieces Listed by Sender," and the number 14 and the name "Howley" are written in the space next to the words "Name of receiving employee." The space next to the words "Total Number of Pieces Received at Post Office" is empty. Mr. Baisley, in his affidavit, advises that he has read the DeCesare affidavit and the exhibits thereto, which permit him to conclude that on February 28, 1997, a Mail Processing Center employee delivered a piece of certified mail addressed to petitioner at 162-35 85th Street, Howard Beach, NY 11414-3324 to the Colonie Center branch of the USPS in Albany for delivery by certified mail, and that a member of his staff thereafter obtained the CMR with the postmark dated February 28, 1997 for the records of BCMS.

CONCLUSIONS OF LAW

A. Subdivision (d) of CPLR Rule 2221 provides as follows:

* * *

(d) A motion for leave to reargue:

* * *

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion;

In her letter dated June 6, 2002, the Division's attorney explained that the motion for summary determination had two parts, with the first part being limited to whether the petition was filed more than 90 days after the issuance of the conciliation order dismissing request relating to notices of determination numbered L012598850 and L012731720. The second part of the Division's motion, presented in the alternative, related to whether petitioner's request for a conciliation conference was filed within 90 days of the issuance of notice number L012731720. This second part of the motion for summary determination is silent as to notice number L012598850. Ms. Murphy argued that with regard to notice number L012598850, the Division only had to prove the proper mailing of the conciliation order dismissing request and that it was not required to either prove that the Division properly mailed the notice, or to include a copy of that notice in the record.

B. Tax Law § 170(3-a)(e) provides that a conciliation order shall be binding on the taxpayer unless the taxpayer files a petition for a hearing within 90 days after the conciliation order was issued (*Matter of Obot*, Tax Appeals Tribunal, February 24, 2000). When the timeliness of the petition is at issue, the Division must establish proper mailing of the conciliation order (*Matter of Obot, supra*). In her letter dated June 6, 2002, the Division's attorney correctly pointed out that the Administrative Law Judge in his order dated June 3, 2002, failed to make a finding as to the sufficiency of the Division's proof of mailing of the conciliation order dismissing request. That oversight is addressed herein. To meet its burden of establishing proper mailing of the conciliation order, the Division must present proof of the standard procedure used by it for the issuance of conciliation orders, and then prove that this standard procedure was followed in the particular instance in question (*Matter of Ermel*, Tax

Appeals Tribunal, February 17, 2000). The affidavit of Mr. DeCesare and that of Mr. Baisley sworn to on January 23, 2002 set forth sufficient proof to establish the Division's standard procedure for issuing conciliation orders. However, it is the Division's proof that this standard procedure was adhered to in the instance here under review that is deficient. As noted in Finding of Fact "10" of the June 3, 2002 Administrative Law Judge order, there is no entry in the space next to the words "Total Number of Pieces Received at Post Office" on page 4 of the CMR.

The number "14" was entered in the space next to the words "Total Number of Pieces Listed by Sender," while the name "Howley" and the number "14" are both written in the space next to the words "Name of receiving employee." There is no showing on the face of page 4 of the CMR as to how many of the 14 pieces of mail listed were actually received at the post office (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). We are not free to speculate what USPS employee Howley had in mind when he or she wrote the number "14" in the space intended for the employee's name. The Tax Appeals Tribunal has stated that, "[d]elivery of a particular item listed in the certified mail record is proven when an employee of the USPS acknowledges receipt of the items listed by completing the form as it is designed, i.e., by entering the number of pieces of mail received in the space provided for that entry" (*Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996, the Tribunal stated,

We ask only that the Division insure, as does the IRS and this Tribunal, that the certified mail record its employee receives back from the postal employee is complete. If the Division fails to do that, we require, as do the Federal courts, evidence other than a flawed certified mail record and affidavit of habit to prove that the notice was mailed.

In *Brager* the Tax Appeals Tribunal cited to several Federal cases including *Epstein v*

Commissioner (58 TCM 128, 134) and *Wheat v Commissioner* (63 TCM 2955, 2958). In each

of these cases the Internal Revenue Service presented flawed documentary evidence and one or more witnesses employed by the USPS, whose testimony, when taken together with the flawed documentary evidence, served to meet the Service's burden of proving the date and fact of the mailing of the notice at issue.

For the Division to meet its burden, it is essential that proof of the number of pieces of mail received at the post office be presented. This burden cannot be met through the presentation of an incomplete CMR and affidavits of office practice alone. Further evidence is required. In *Wheat* and *Epstein* that further evidence was presented in the form of testimony from USPS employee witnesses. I conclude that the Division has failed to prove the date and fact of the mailing of the conciliation order dismissing request. It follows that the statutory 90-day period in which to protest the conciliation order was not triggered and, without more, petitioner would be entitled to a hearing on the merits of both notices of determination (L012598850 and L012731720). However, there is more.

C. In the order of the Administrative Law Judge dated June 3, 2002, Conclusions of Law "C" and "D" read as follows:

C. Tax Law § 1147(a)(1) provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." This section further provides that the mailing of such a notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of proving proper mailing rests with the Division (*Matter of Novar TV & Air Conditioning Sales & Service, Inc.*, Tax Appeals Tribunal, May 23, 1991). A notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

D. Where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination (*Matter of Novar TV & Air Conditioning Sales & Service, Inc., supra*). The required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of notices provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of Perk*, Tax Appeals Tribunal, December 13, 2001).

As to notice number L012731720, the affidavit of Geraldine Mahon and the associated affidavit of James Baisley, that sworn to on January 24, 2002, contain sufficient proof to establish the Division's standard procedure for issuing such notices. The affidavits demonstrate that, as each notice is generated, a unique certified control number is assigned to each notice. In the process, a CMR is generated which contains the names and addresses of the taxpayers to whom notices are to be issued on a particular date, the assessment numbers of those notices and the corresponding certified control numbers of each listed notice. Next, the Division established that its standard procedure was followed on October 7, 1996 in the generation and mailing of notice number L012731720 to petitioner. Specifically, the Mahon and Baisley affidavits together with the CMR show the total number of pieces of mail received by the USPS to be 470, while the postmark on each page of the CMR establishes the October 7, 1996 date of mailing. The number 470 is circled on page 43 of the CMR next to the signature of the USPS employee. The significance of the circled number 470 and the signature is explained by Mr. Baisley in terms of the Mail Processing Center, that he supervises, having requested that the receiving postal employee indicate the total number of pieces of mail received by the USPS by either circling the number of pieces or writing that number on the last page of the CMR next to the employee's signature or initials. This serves as the acknowledgment of receipt by the USPS of the number of pieces of mail circled or written on the last page of the CMR. Accordingly, and consistent with the Tax Appeals Tribunal's reasoning in *Matter of Roland (supra)*, the Division has established that notice of determination number L012731720 was properly mailed to petitioner on October 7, 1996 at his last known address. It follows that petitioner was required to file his request for a conciliation conference or petition the Division of Tax Appeals for a hearing within 90 days of October 7, 1996, or Monday, January 6, 1997. The Division has placed in the record a copy of a request for a conciliation conference bearing only notice number L012598850, which request is associated with a copy of

an envelope that bears a USPS postmark that is dated January 29, 1997. There is no proof in the record that a request for a conciliation conference for notice number L012731720 was filed by January 6, 1997. The conciliation order dismissing request serves to acknowledge receipt of a request for a conciliation conference for notice number L012731720 on January 29, 1997. Because the request is untimely, the Division of Tax Appeals lacks jurisdiction to provide a hearing on the merits as to notice of determination number L012731720.

In the Division's motion for leave to reargue and petitioner's response thereto, neither party takes issue with Conclusions of Law "C" or "D" of the June 3, 2002 order, which held that petitioner's request for a conciliation conference as to notice number L012731720 was untimely and the Division of Tax Appeals lacked jurisdiction to grant a hearing on the merits. That conclusion remains undisturbed in this modified order.

D. With respect to the June 3, 2002 order relating to notice number L012598850, the notice was canceled due to the absence from the record of a copy of the notice and the absence of a CMR and affidavits of office practice in support of the mailing of the notice. In its motion for leave to reargue, the Division averred that because the focus of its motion for summary determination was its proof of mailing of the conciliation order dismissing request relating to both notices, and proof of mailing of notice number L012731720 only, and "because the Division did not argue that the petitioner was late asking for a Conciliation Conference after the issuance of the Notice (number L012598850)" (Murphy letter dated June 6, 2002, page 2), the Division was only required to prove the mailing of the conciliation order and notice number L012731720, and not notice number L012598850. In point of fact, in paragraph 4 of the affidavit of the Division's attorney submitted in support of its motion for summary determination, Ms. Murphy specifically states that the petition received by the Division of Tax Appeals on October 1, 2001 "does not fall within 90 days of the date of issuance of the Notices

of Determination (Notice Nos. L-012598850 and L-012731720).” Having reexamined Ms. Murphy’s affidavit and reading it with her letter dated June 6, 2002, I am left with the conclusion that it had been her intention in paragraph 4 of her affidavit to measure the 90-day period from the issuance of the conciliation order dismissing request and not, as stated, from the issuance of the two notices of determination. Mindful of this and my obligation under 20 NYCRR 3000.9(b) to deny summary determination where material and triable issues of fact are extant, I find that in granting summary determination to the nonmoving party and canceling notice number L012598850, I deprived the Division of an opportunity to present proof of mailing of this notice and a copy of this notice, and by so doing I disregarded the existence of material and triable issues of fact that compel the denial of summary determination.

E. The Division’s motion for leave to reargue is granted and the order of the Administrative Law Judge dated June 3, 2002 is modified to the extent that notice of determination number L012598850 is reinstated and petitioner is granted a hearing on the merits thereof, unless within 10 days of the date of issuance of this modified order petitioner elects in writing to compel the Division to prove that it properly issued notice number L012598850, in which case the hearing on the merits of said notice will be converted to a timeliness hearing.

F. With respect to the conclusions in the order dated June 3, 2002 that the Division of Tax Appeals is without jurisdiction to grant a hearing on the merits as to notice number L012731720, and that petitioner is entitled to a hearing on the merits as to notice of deficiency number L006333447, the Division’s motion for leave to reargue is granted and the Administrative Law Judge’s conclusions in the prior order respecting notice number L012731720 and notice number L006333447 are adhered to. A hearing will be scheduled in due course by the Division of Tax

Appeals to address the merits of notice number L006333447 and the merits of notice number L012598850 or, at the election of petitioner, the timeliness of any petition or request for a conciliation conference filed in protest of notice number L012598850 in lieu of a hearing on the merits.

DATED: Troy, New York
August 15, 2002

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE